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Intent, Purpose and Motivation in Constitutional Litigation

Leon Friedman

INTENT, PURPOSE AND MOTIVATION IN CONSTITUTIONAL LITIGATION

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Honorable George C. Pratt:

Professor Leon Friedman teaches at Hofstra Law School and is an active litigating attorney and lecturer who has lectured in this program since the first year. We were just reminiscing at lunchtime and after lunch our speaker was not there. I became a little upset and wondered what to do. We got a telephone call that the plane had been sent to some other airport and our scheduled speaker was not going to be here. Leon offered to cover the lecture and, without any notes, delivered a beautiful presentation on something that he had about three minutes to prepare. This morning he has a chance to outdo himself with a subject that, for me, has my head spinning. He deals with the questions of motive, purpose and intent in constitutional litigation, particularly as it interacts with qualified immunity. After this morning's lecture, I am sure I will understand it and have no further problems.

Professor Leon Friedman:

I will discuss the wonderful interrelation between intent, purpose and motivation. I have always loved analyzing the difference between these three concepts in the criminal procedure area. These words are used interchangeably in three different areas of the law and the words mean something different depending upon what area you are talking about.

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Let me briefly get the criminal part of it out of the way. We use intent in the criminal law because at that point the key consideration is whether one volitionally wanted to do that which one was accused of doing. Intent in the criminal area is used to compare it to some other concept which might bear on one's criminal liability. A lawyer will examine whether conduct was intended, whether it was negligent, or wether there was an accident. Intent is relevant in criminal law because an act may or may not be a crime depending upon the mental state with which it was done.

A defendant's purpose, assuming that the activity was volitional, may effect sentencing. If a person stole some money in order to help a starving grandmother, the purpose may be important regarding sentencing guidelines. However, in the criminal law area, it has a very limited purpose in defining the scope of the crime and perhaps dealing with sentencing when it was all over.

Intent, purpose and motivation in constitutional litigation is important in three other areas, one of which involves legislative action. There is administrative action taken with a certain mental state and then there is individual action by a state actor. Those are the areas that I will discuss.

First, I will discuss legislative intent. I attended the Harvard Club on Tuesday and Justice Scalia gave his usual speech on legislative intent, which I have heard several times. It is getting better each time because he adds a little bit to it. Yet, he gave another speech on why legislative intent is irrelevant and why you must only look at what the words say and not the legislative intent of the law. He warns that it will get us into the individual motivation of legislators, which is the worst thing that any judge could ever do, except when a judge is required to do so. However, Justice Scalia indicates that a judge may be allowed to examine legislative intent under some circumstances.

Now, the starting point of all of this is the bedrock case of *United States v. O'Brien*.[2] "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[3] I was

[2] 391 U.S. 367 (1968).

[3] *Id.* at 383.

one of the lawyers in the case of *U.S. v O'Brien.* As you may remember, this is the draft card burning case. Congress, as a result of some highly publicized protests by draft resistors burning their draft cards, added a new section to the selective service law by adding a five-year penalty to anyone who knowingly destroyed a valid draft card.[4] There is absolutely no doubt why they did it. I think Representative Rivers of South Carolina saw draft protestors burning their draft cards in protest of American policy. I forget which island we were invading at the time, but the first draft card burnings did not relate to Vietnam, but to the Dominican Republic. I believe that we invaded the Dominican Republic back in the 1960's, and there were widespread protests and draft cards were burned. The congressional record reflected that there was no doubt as to why people protested. Congress did not like these flagrant protests against our military policy and Congress passed a law to proscribe such activity.[5]

It was already a crime, by the way, not to have a draft card in your possession. If you burned your own draft card, you would no longer have it in your possession, thus you would already be subject to the crime of not having it in your possession. The First Circuit said the law was unconstitutional because it did not serve any purpose.[6] The First Circuit said that if there is a big hole in the fence for the big cat -- namely a five year penalty for not having the draft card in your possession -- you do not need a small hole in the fence for the little cat because the larger crime is already covered.[7] If you burn your card, you no longer have it in your possession, you already committed the other crime. The Court of Appeals said the purpose of adding this law was a First Amendment purpose namely to put down these protests.[8]

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[4] *Id.* at 370.

[5] *See* Dean Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 Sup. Ct. Rev. 1, 3-6 (1968).

[6] O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967), *vacated*, 391 U.S. 367 (1968).

[7] *Id.* at 540-41.

[8] *Id.*

The Supreme Court held that a court can not look at legislative motive. Six years before, in *Gomillion v. Lightfoot*,[9] which is the Tuskegee gerrymandering case, the City of Tuskegee had an illegal illicit motivation for carving out a section of Tuskegee so that a majority of blacks could not elect a candidate of their choosing.[10] It was an illicit legislative motive, namely, the motive to deprive the black citizens of that locale of a place in the city council[11]. The court considered the illicit legislative motive in *Gomillion v. Lightfoot*.[12]

Justice Douglas was the only dissenting Justice in *O'Brien*.[13] He dissented on the ground that the draft was unconstitutional and never addressed the First Amendment issue at all.[14] Chief Justice Warren, in his opinion in *O'Brien*, wrote that the worst thing one could do is look at the individual motivation of legislators.[15] The majority argued that if someone makes a stray remark on the floor, then it can be argued that such remarks are the purpose behind a particular law, or that you may have to call them as a witness and ask them for their individual motivation, which is even worse.[16] In the parade of horribles, summoning legislators for testimony appears to be worse than discussing the individual motivation of legislators. And you can never do that, except in *Arlington Heights*,[17] where the Supreme Court said there is no absolute rule against it and indeed you may be able to do it. Therefore, we have this parade of horribles and then we have all kinds of exceptions to the parade of horribles. However, the Supreme Court in the *O'Brien* case said that there is a very limited and well-defined class of cases where the very nature of the constitutional question

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[9] 364 U.S. 339 (1960).
[10] *Id.* at 340.
[11] *Id.* at 341.
[12] *Id.* at 342.
[13] *O'Brien*, 391 U.S. at 389.
[14] *Id.*
[15] *Id.* at 383-84.
[16] *Id.* at 384.
[17] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 268 (1977).

requires an inquiry into legislative purpose.[18] Therefore, one may not inquire into legislative purpose, unless required by law.

Now when must you do it? Well, there are at least three areas where you must inquire into legislative purpose. First, I will discuss the process as it relates to legislation and I will delve into administrative and individual decision making later. An inquiry into legislative purpose is required to prove a constitutional violation to strike down a law. A plaintiff's burden of proof is to show that the legislation had an illicit purpose. The common areas where legislative intent is relevant are in bill of attainders, establishment of religion, equal protection, and at times First Amendment areas. Matters involving a bill of attainder law is where a legislative action is directed against an individual or a group of individuals with the intent to inflict punishment.

For example, in *Nixon v. Administration of General Services*,[19] Congress passed a law taking away the tapes and papers of Richard Nixon. He was the only president of the United States whose tapes and papers were taken away. The government would not allow him to have them in his possession and he argued that the law taking away the tapes and papers was a bill of attainder. Nixon argued that he was being punished, and the Supreme Court agreed. The Court contended that only Nixon was being hurt, but there was no intent.[20] The legislature did not intend to hurt the President as he was in a class of one. Namely, he was the only president who left office one step ahead of the sheriff, and therefore, the government had a legitimate reason to look into papers and there was no intent to punish him and one must look at that.

One must look at purpose and intent. Sometimes legislatures pass laws that hurt, injure, take something away, or punish you, but if an argument is framed using a bill of attainder analysis, one must show that the legislative purpose was indeed to injure or hurt. How do you show injury? You do not show injury by looking for language from the legislature such as "I hate this person or I want

[18] 391 U.S. at 384 n.30.
[19] 433 U.S. 425 (1977).
[20] *Id.* at 468.

to hurt you." This is unacceptable. In *United States v. Lovett*,[21] the United States Government indicated that a person shall never work for the United States again and passed a law to that effect.[22] By reviewing legislative history, it was very obvious that there was an intent to injure.[23]

On a similar note, I am now working on a bar association report on whether Congress can pass a law censuring Bill Clinton and imposing a fine on him for the wrongs he committed. The critical issue is whether censuring him and imposing a fine on him is a bill of attainder. The question is whether Congress is trying to hurt Clinton by passing such a law. I do not think so. A bill of attainder is a very funny little article of the Constitution that keeps coming up, it is not a dead letter by any means.

A second area is the Establishment Clause,[24] where you must look at the legislative purpose under *Lemon v. Kurtzman*.[25] If there is a law which is alleged to establish religion, you have the following test. "First, the statute must have a secular legislative purpose."[26] If the statute does not have a secular purpose and advances religion, then it may very well violate the establishment clause. Let's look at the two big cases recently, *Wallace v. Jaffree*[27] and *Edwards v. Aguillard*.[28]

In *Wallace v. Jaffree*, an opinion written by Justice Stevens, involved the minute of silence in the Alabama schools.[29] In *Wallace*, the Supreme Court indicates that there is no need to look at the second or third criteria if the statute does not have a clearly secular purpose.[30] Although a statute is motivated in part by a religious purpose, in applying the purpose test, it is necessary to

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[21] 328 U.S. 303, 315 (1946).

[22] *Id.* at 305.

[23] *Id.* at 315.

[24] U.S. CONST. amend. I. The First Amendment provides in pertinent part: "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

[25] 403 U.S. 602 (1971).

[26] *Id.* at 612.

[27] 472 U.S. 38 (1985).

[28] 482 U.S. 578 (1987).

[29] 472 U.S. at 40.

[30] *Id.* at 56.

ask whether the government's actual purpose is to endorse or disapprove of religion.[31] Every other sentence in the opinion is talking about purpose. The sponsor argued that introducing the moment of silence was to bring prayer back into the school.[32] He was called as a witness and testified about his statements. I think there were three dissents in that case. Justice Scalia was not on the Court at that time. This case was the year before Justice Scalia got there.

Two years after Justice Scalia gets on the Court, we have *Edwards v. Aguillard.* In *Edwards*, the State of Louisiana passed a law saying that if you teach evolution, you must teach creationism.[33] Neither area is required to be taught in the curriculum, but if evolution is taught, creationism must be taught as well.[34]

Now, what is wrong with that? It is facially invalid as a violation of the establishment clause because the purpose was to advance religion. Justice Scalia's dissent immediately says what the problem is here. [35] Justice Scalia gets into purpose and he says what is wrong with the case is that one must look at individual motivation. The majority does not dispute the fact that you have to look at the individual motivation of the legislator. One must not look at the individual motivation of legislators unless one is required to look at the individual motivation of legislators. Thus, his whole dissent is that in order to apply the *Lemon*[36] test, which of course he does not like, you have got to look at whether the purpose is a secular purpose or to advance religion.[37] In order to look at wether a secular purpose or a religious purpose is being advanced, you have to look at individual motivation of legislatures, which is not allowed except that it is done. However, in the establishment area, no one pays a lot of attention to it. In short, we

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[31] *Id.*

[32] *Id.* at 39.

[33] *Edwards*, 482 U.S. at 581.

[34] *Id.*

[35] *Id.* at 610 (Scalia, J., dissenting).

[36] *Id.* (Scalia, J., dissenting). *See also* Lemon v. Kurtzman, 403 U.S. at 612-13.

[37] *Edwards*, 482 U.S. at 613 (Scalia, J., dissenting).

have to look at purpose that may require an inquiry into motivation. Justice Stevens has stated that we have to decide whether the legislature was motivated by a secular purpose. There is nothing so horrible about that except how you do it. It is still the law by the way. You still have to decide, under the *Lemon* test, whether there is a secular purpose and it is part of the way of proving your point of view.

Equal protection law prohibits any purpose which may disadvantage a racial or secular group protected under the Equal Protection Clause.[38] Equal protection had been invoked from *Gomillion v. Lightfoot,*[39] where there was an improper motivation in drawing the legislative lines that would disfavor minorities up to *Shaw v. Reno,*[40] and all the most recent cases where a legislative purpose to advantage a minority group undercuts the law. We have had a whole series of five to four decisions from the Supreme Court. There have been six cases since *Shaw v. Reno.*[41] I think the last one was *Abrams v. Johnson*[42] which was *Miller v. Johnson.*[43] A Louisiana case, *Reno v. Bossier Parish School Board*[44] also involved an equal protection claim involving legislative purpose. In all of the cases mentioned, the issue is the purpose or motivation of the legislature where the predominant motive is racial. Now, in *Gomillion,*[45] there was a racial motive to disadvantage the black citizens in depriving them of a right to have a representative in the Tuskegee city council. More recently, in Louisiana, the motive was to provide an advantage to a particular group, that is to say to draw race conscious lines so that the legislature would reflect on some proportional representation basis, the actual population in the various states.[46]

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[38] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954), *see also* Cooper v. Aaron, 358 U.S. 1 (1958).

[39] 364 U.S. 339 (1960).

[40] 509 U.S. 630 (1993).

[41] *Id.*

[42] 521 U.S. 74 (1997).

[43] 515 U.S. 900 (1995).

[44] 520 U.S. 471 (1997).

[45] *Gomillion*, 364 U.S. 339 (1961).

[46] *See Reno*, 520 U.S. 471.

By the way, I have to confess, I was involved in a South Carolina case[47] involving the South Carolina legislature, and I was on the wrong side, if I may put it that way. I was representing the white Democratic party and our opposition was the State of South Carolina, the Attorney General of the United States, the ACLU and the Republican National Committee who liked the lines. All my ACLU friends were on the other side, spitting on me. Yet, we won the case because the lines were clearly drawn with race in mind. The lines were redrawn and another election was planned. Every black representative was re-elected and there were seven more democrats elected to the state legislature. South Carolina did very well this year under these redrawn lines, but the key point in all of that was that race was the predominant motive in drawing the lines. It is a violation of the Equal Protection Clause to draw lines based on race, and it does not make any difference whether you draw the line with race in mind to help or draw the line with race in mind to hurt. The motive is the salient factor in determining whether the law shall prevail.

It is important to note that this is not only a racial issue. In *Personal Administrator of Massachusetts* v. *Feeney*,[48] veterans had a preference in obtaining employment in Massachusetts. If you were a veteran, you did not just get five extra points or ten extra points, you were put at the top of the list. If there was someone who barely passed the entrance exam and earned a "C" and the person was competing with a non-veteran who was a Nobel Peace Prize winner, and got a perfect score, the veteran would get the job over the person at the top of the list. The differential treatment between the sexes indicate that women suffer because women were not veterans. The Supreme Court stated that in order to prove an equal protection violation, one must prove that the legislature acted to accomplish an end in response to a situation rather than "in spite of" the adverse effect.[49] In order to prove an equal protection violation, one must show that the legislators desired a particular result. In the equal protection area, there is absolutely no doubt that

[47] Smith v. Beasley, 946 F. Supp. 1174 (D.S.C. 1996).
[48] 442 U.S. 256 (1979).
[49] *Id.* at 279.

the plaintiff's burden, in order to succeed in invalidating the legislation, is to demonstrate the invalid legislative purpose.

There is a wonderful case in the D.C. circuit involving Rupert Murdock, *News America Publishing, Inc. v. FCC*,[50] in which the legislature passed a law which prohibited someone from owning both a newspaper and television station in the same area. On the face of it, there is nothing wrong with that. There are too many people and too few media outlets. There was only one person that was really affected and Rupert Murdock claimed injury. Senator Hollings passed an amendment that was very specific that did not say anything about Rupert Murdock. His name was not in the legislation and the premise for passing the law was hidden. However, it was very clear what the legislators had in mind, and the D.C. Circuit struck it down. There was a bill of attainder argument made, but it was hard to succeed on that. The court struck down the law on First Amendment grounds. They said when legislation affecting speech appears underinclusive, where it singles out conduct for adverse treatment and leaves untouched conduct which seems indistinguishable in terms of the law's ostensible purpose, the omission is bound to raise a suspicion that the law's target is the message.[51]

Accepting that intuition without making an actual determination of the legislature's motives, the Supreme Court has, for the regulation of speech, insisted on a closer fit between its apparent purpose than for any other kind of legislation. The Supreme Court often asks whether a law is content-based. To determine whether a law is content-based, the Court looks at the general effect on the market or considers First Amendment issues. There is no way to determine the validity of some laws without questioning its purpose. The FCC case is one area regarding First Amendment law where there is an inquiry of the legislative purpose of a law.

There are cases dealing with zoning laws such as *Playtime Theaters, Inc. v. City of Renton*[52] and *Boos v. Barry*[53] where the

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[50] News America Publishing, Inc. v. Fed. Communications Comm'n, 844 F.2d 800 (D.C. Cir. 1988).

[51] *Id.* at 805.

[52] 475 U.S. 41 (1986).

zoning law is passed to prohibit the operation of adult entertainment establishments. One way to determine if the law is valid is if the purpose of the law is to affect the secondary effects of the activity.[54] If the purpose is to prohibit content then a particular law is invalid. In cases involving zoning law, there is a prohibition of seeking legislative motivation. The Supreme Court has established a legal test requiring you to look at purpose, and it is difficult to look at purpose other than by reviewing what the legislatures say.

I agree, it is very hard to drag out of a legislature the purpose in passing a law. In *Village of Arlington Heights v. Metropolitan Housing Development*,[55] the Court indicated that there might be legislative immunity. *Arlington Heights* was an administrative decision. It is easier when you deal with an administrative decision, than it is with a true legislative decision. In *Bogan v. Scott Harris*[56] which was decided last year, legislators were sued for employing improper purposes in enacting legislation. At this juncture, we can not sue anymore. The Court stated that if it looks like a law, smells like a law, quacks like a law, it is a law and individual people voting for it will have legislative immunity.

I will discuss when one must look at an individual legislator's motivation. As I just mentioned, there are at least four areas where the legislature's motivation is important. Legislative motivation is critical in deciding cases involving Bill of Attainder, Establishment Clause, Equal Protection and at least some First Amendment cases. I worked on *S.C.E.A. v. Campbell*[57] where the South Carolina legislature passed a law prohibiting the South Carolina's Educational Association from having dues check off privileges. The South Carolina legislature was very unhappy with certain liberal stands that the South Carolina Educational Association had taken and they passed a general law saying no public employee union has dues check off privileges. There was another union that was also affected and they came back a year later saying they lost

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[53] 485 U.S. 312 (1988).
[54] *Playtime Theaters*, 475 U.S. at 47.
[55] 429 U.S. 252 (1977).
[56] 523 U.S. 44 (1998).
[57] 697 F. Supp. 908 (D.S.C. 1988).

half their membership dues without check off privileges so the legislature gave it back to them and the only public service organization that did not have it was the South Carolina Educational Association. We went in to court on a bill of attainder theory and challenged the activity on First Amendment grounds. We won on the trial level, but the circuit court reversed.[58] The circuit court indicated that we were requesting the court to look at motivation, by which the court is precluded.

Sometimes you can inquire into motivation in the First Amendment area and sometimes you can not. There is no blanket rule as there is in the establishment and equal protection cases that every time there is an alleged improper First Amendment purpose behind legislation, you will be able to get into it and prove it. The *News America* case is an example when you could, but sometimes it is not so easy.[59]

At this point, I will discuss how improper motivation is analyzed if conducted by an administrative board or an individual. Assume that we have a body which is acting administratively rather than legislatively. In *Bogan v. Scott-Harris*,[60] the defendant eliminated the plaintiff's position as opposed to firing the individual. If the defendant simply said, "I am going to fire you, you no longer have this job," that would have been an administrative decision, and then you are right into First Amendment retaliation, which involves traditional analysis. The court must determine if a party exercised First Amendment rights, if there is a causal connection between the exercise of First Amendment rights and the adverse employment decision.[61] The court must determine whether the exercise of First Amendment rights was a substantial motivating factor in the adverse employment decision. One certainly should be able to question the defendant about the motivating factor.

Arlington Heights was changing the zoning laws to allow multi-dwelling housing so that some lower income housing could be built

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[58] 697 F. Supp. 908 (D.S.C. 1988), *rev'd*, 883 F.2d 1251 (4th Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990).

[59] *News America Publishing, Inc.*, 844 F.2d 800.

[60] 523 U.S. 44 (1998).

[61] Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 280-81 (1977).

in the town. The Supreme Court stated that in some extraordinary instances legislators may be called to the stand to testify concerning the purpose of the official action. Such testimony will frequently be barred by privilege. At any rate, you are allowed to inquire as to motivation in a non-legislative area where you have an administrative board. I do not see any reason if it is the chief of police or the administrative board making the decision that you have to prove that they did it because it was a substantial motivating factor. The motive, purpose, intent, mental state of the administrative board or of the individual is relevant and you must be allowed to inquire into it, otherwise you can not prove one element of First Amendment retaliation.

Now, *Crawford*[62] tells us that there is no pleading requirement in which you must plead specific facts to show that improper purpose of motivation under Eighth Amendment analysis. The Eighth Amendment[63] is invoked to prove cruel and unusual punishment. A plaintiff must show that the defendant's purpose to inflict pain is the basis for the complaint. One must demonstrate purpose in some constitutional litigation, or the elements of the case will not be proven.

I must say the worst thing to do is bring members of a legislature into court and question them about their motivation unless such action is required. We have determined that when a defendant board is acting administratively or dealing with a particular individual, one must show that the party acted with a mental state that the constitution prohibits under Equal Protection, First Amendment retaliation, or the Eighth Amendment.

In the First Amendment area, we have a couple of shortcuts. One of the shortcuts deals with activity that was performed in close proximity in time to the exercise of a First Amendment right.[64] You do not have to prove that a party acted in bad faith because of hate and that the plaintiff said something which offended the

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[62] Crawford-El v. Britton, 523 U.S. 574 (1998).

[63] U.S. CONST. amend. VIII. The Eighth Amendment states in pertinent part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

[64] San Filippo v. Bongiovanni, 30 F.3d 424, 435, n.14 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1082 (1995).

defendant. If there is a close proximity in time between the exercise of First Amendment right and the adverse action, then you have met your burden on the second part of the four part test.[65] To prove First Amendment retaliation, the plaintiff must show the exercise of a First Amendment right -- that is, the employee spoke on a matter of public concern, then adverse action was taken -- and that there was a causal connection between the exercise of First Amendment rights and the adverse action. Then the burden shifts to the defendant to show that the plaintiff would have been fired anyway. The burden shifting must be shown by a preponderance of the evidence. The final element that creates intense bickering is where a defendant takes adverse action because of the plaintiff's exercise of a First Amendment right, but, nevertheless, there is a legitimate governmental reason for taking such action. In the First Amendment retaliation area, you can avoid the individual inquiry of members of the administrative board or of the individual by showing this causal connection. Obviously, if you have somebody who says, "Did you see what this teacher said in yesterday's newspaper? Boy, I am going to get that teacher," then you do not need the causal connection; you have something right out of their mouth to show the illicit purpose.

In *Arlington Heights,*[66] the Supreme Court demonstrated that in equal protection analysis there is no violation unless discriminatory intent is shown. You have to look at the mental state so that intent is required. Again, no one is fighting over the difference between the purpose or motivation in the equal protection area because it is an element of the constitutional violation. In *Arlington Heights,*[67] the town won in the Supreme Court, and then they lost in the Seventh Circuit on remand because the plaintiffs were able to show intent; they were able to show an improper discriminatory motive so they were able to succeed, even in that case.

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[65] Stever v. Independent School Dist. No. 625, 943 F.2d 845 (8th Cir. 1991).

[66] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. at 268 (1977).

[67] *Id.*

Honorable George C. Pratt:

I could have cleared up this whole area when I was a district judge relatively new on the bench. I had a case involving Island Tree school district, where the school board members ordered certain books to be taken off the library shelves.[68] The civil liberty union felt this was a First Amendment violation, as the books were obviously selected for their content, at least, by some of the school board members. I dismissed the case. The former school attorney knew how school boards operated and so forth, it was obvious to me somebody has to decide what must go on the library shelves and the only way to do that is by content. So there is no difference between putting them on and taking them off, I dismissed it. The Second Circuit wrote three opinions, they reversed me two to one, it went to the Supreme Court, they upheld the Second Circuit five to four, and they wrote seven opinions.[69] The end result was to remand it to me to decide what was the intent of the school board when they passed the regulation. I thought, "here is my chance," I am going to insist that they bring in every school board member and examine them as to what was going through his or her mind. As a result, I had a high public interest case. My intent, at this point, was to show how asinine the Supreme Court was in trying ever to determine what a board's intent was. They settled that case. Had the case gone ahead, we might not have had an awful lot of this subsequent litigation, but so be it.

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[68] Pico v. Board Of Educ., Island Trees Union Free School District, 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *rev'd*, 457 U.S. 853 (1982).

[69] *Id.*